NO. 83-1323

IN THE

Supreme Court Of The United States

October Term, 1983

RICHARD C. COX, RALPH J. RANSDELL, SR., PAULA JEAN SYMPSON SMITH — APPELLANTS

V.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J.H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT, GORDON R. GARNER, COMMISSIONER OF PUBLIC WORKS OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

ON APPEAL FROM THE
SUPREME COURT OF KENTUCKY

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

(Attorneys for Appellees Appear on Inside Front Cover)

PRINT MASTER, INC., 839 LANE ALLEN RD., LEXINGTON, KY. 40504, PH. (606) 276-6341

MARY ANN DELANEY
SUZANNE SHIVELY HAVENS
Lexington-Fayette Urban
County Government
Department of Law
200 East Main Street
Lexington, KY 40507
(606) 254-8741

Attorney for Appellees
Other Than Lexington-Fayette
County Health Department

PHILLIP D. SCOTT
KATHLEEN A. McDONOUGH
Greenebaum, Doll & McDonald
333 West Vine Street
Lexington, KY 40507
(606) 231-8500

Attorney for Lexington-Fayette
County Health Department

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MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT

Pursuant to Rule 16, paragraphs 1(b) and 1(d) of the Rules of the Supreme Court of the United States, appellees move that this appeal be dismissed or, alternatively, that the judgment of the Supreme Court of Kentucky be affirmed, for the reasons set forth below.

JURISDICTION

This is an appeal from the final judgment of the Supreme Court of Kentucky upholding the validity of a state statute which had been challenged as being repugnant to the due process clause of the fourteenth amendment to the Constitution of the United States. The opinion of the Supreme Court of Kentucky upholding the validity of the statute was rendered on August 31, 1983, and the judgment became final on November 23, 1983, when appellants' petition for rehearing was denied by the Supreme Court of Kentucky. The opinion of the Supreme Court of Kentucky is now officially reported as 659 S.W.2d 190 and is included as Appendix A to this Motion. The jurisdiction of this Court has been invoked under 28 U.S.C. 1257(2).

STATUTES INVOLVED

The Kentucky statutes involved, KRS 67A.871 through 67A.894, are set out in full in Appendix B to this Motion.

STATEMENT OF THE CASE

In 1976, the Kentucky General Assembly enacted legislation, codified as KRS 67A.871 through 67A.894, which authorized urban county governments to construct sewers, and which authorized and provided procedures for financing the construction projects undertaken. Thereafter, the Lexington-Fayette Urban County Government ("Urban County Government") instituted a series of sewer projects, financed as authorized by KRS 67A.871 through 67A.894.

In compliance with the provisions of KRS 67A.875(1), the legislative body of the Urban County Government, the Lexington-Fayette Urban County Council, initiated the "third year sewer project" on January 10, 1980, by passage of an ordinance determining that there was a need for the construction of the sewers in the area in question. On March 4, 1980, the ordinance of initiation required by KRS 67A.875(3) was passed. As required by KRS 67A.875(6), this ordinance ordered a public hearing at which owners of property in the proposed project area could appear and be heard as to whether the project should be undertaken, whether the nature and scope of the project should be altered, and whether the project should be financed through assessments on benefited properties and issuance of bonds. At the time of the hearing, which was held on March 31, 1980, estimated costs and assessment amounts were available.

Following the public hearing, the ordinance of determination required by KRS 67A.879 was enacted by the Lexington-Fayette Urban County Council. This ordinance determined that the project would be undertaken, set forth the nature and scope of the project, and established the methods by which the project was to be financed. These methods included assessments on benefited property, and a bond issue to be repaid by periodic payments from property owners who elected not to pay their assessments in a lump sum.

On June 30, 1980, certain property owners in the project area commenced the action now before this Court, challenging the proposed sewer project as permitted by KRS 67A.880, and the statutes which authorized the project. One question presented by the complaint was that which is before this Court, whether KRS 67A.875(6) violates the due process clause of the fourteenth amendment to the United States Constitution by failing to afford affected property owners a hearing on the exact amount of the improvement benefit assessments before the assessments are levied and become a lien against their respective properties. On August 16, 1982, the Fayette Circuit Court issued its findings of fact and conclusions of law, which were favorable to the project and upheld the constitutionality of the authorizing legislation. On September 3, 1982, final judgment was entered dismissing all forty-one counts of the property

owners' complaint, and authorizing the Urban County Government to proceed with the project.

The property owners appealed this judgment to the Court of Appeals of Kentucky, whereupon the government defendants moved to transfer the case to the Supreme Court of Kentucky. While this motion was pending, the government notified the property owners that the Urban County Government would immediately go forward with the challenged sewer construction project because the trial court judgment in the Fayette Circuit Court was the final judgment favorable to the project contemplated by KRS 67A.880(2) and 67A.881. The Supreme Court of Kentucky, the Court of Appeals of Kentucky, and Fayette Circuit Court were advised of the Urban County Government's intent to proceed with the sewer project by the by the governmental defendants' filing of an amended motion to transfer the appeal containing a statement of intent to proceed with the project pending appeal.

The property owners immediately filed a motion seeking abatement of all project proceedings pending their appeal. This motion was denied without comment by the Court of Appeals of Kentucky. Subsequently, the Supreme Court of Kentucky granted the government defendants' amended motion to transfer the appeal to that court.

On August 31, 1983 the Supreme Court of Kentucky issued an opinion, affirming the judgment

of the Fayette Circuit Court. It specifically held that the public hearing process protected the due process rights of property owners. The Court stated:

> The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a "trial-type" hearing.
>
> The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. *Mathews* v. *Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). On March 31, 1980, a public hearing was held on this project at which several property owners spoke on the subject and on the matter of the estimated assessments. No exact figures as to the cost of the benefits were presented because final bidding had not been made. All benefited property owners were given an opportunity to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost to the assessed does not invalidate the meeting. If a property owner is given an opportunity to be heard at some time during the assessment proceedings before the liability of his property is fixed, due process is satisfied. *Shaw* v. *City of Mayfield*, 204 Ky. 618, 265 S.W. 13 (1924).

Conrad v. *Lexington-Fayette Urban County Government*, Ky., 659 S.W.2d 190, 197 (1983). The property

owners filed a petition for rehearing before the Supreme Court of Kentucky which was denied. On December 12, 1983, this appeal was filed by three of the original property owner plaintiffs.

ARGUMENT

The Appeal herein fails to present a substantial federal question because the decision of the Supreme Court of Kentucky followed long established precedent of the United States Supreme Court. Accordingly, the appeal should be dismissed, *Levering & Garrigues Co.* v. *Morrin*, 53 S.Ct. 549, 289 U.S. 103, 77 L.Ed. 1062 (1933), or the decision of the Supreme Court of Kentucky affirmed summarily.

Although appellants have stated the question on appeal as being whether KRS 67A.875(6) violates the due process clause, the Supreme Court of Kentucky actually did not speak in terms of that provision alone when it held that "the public hearing provided for affected property owners" was constitutional and protected due process rights. The public hearing is also the subject of KRS 67A.875(7), KRS 67A.876, and particularly KRS 67A.878, which sets forth in detail what is to happen at the hearing. Presumably, the Supreme Court of Kentucky considered all of these provisions in its holding.

In support of their claim that the public hearing provisions of KRS 67A.871 through 67A.894 are repugnant to the due process clause of the fourteenth

amendment to the United States Constitution, appellants cite the rule enunciated by this Court in *Londoner* v. *Denver*, 210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708, 714 (1907). This rule does not support their claim, however, because it applies only where the legislature, instead of itself fixing the specific amount of the assessment against each property owner, delegates that task to a subordinate, administrative body. Accordingly, this Court has stated:

> [W]hether a property-owner is entitled to be heard in advance upon the questions of benefit and apportionment depends upon the authority under which the assessment is made. When the assessment is made in accordance with a fixed rule adopted by a legislative act, the property-owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred.

Withnell v. *Ruecking Construction Co.*, 249 U.S. 63, 63 L.Ed. 479, 39 S.Ct. 200, 201 (1919).

This rule applies not only in the case of assessments enacted directly by a state legislature but also, as in this case, when an assessment has been enacted by a municipal legislative body which has been granted full legislative power over the subject matter by the state. *Browning* v. *Hooper*, 269 U.S. 396, 70 L.Ed. 300, 46 S.Ct. 141, 143 (1926); *Cheseboro* v. *Los Angeles County Flood Control District*, 306 U.S. 459, 83 L.Ed. 921, 59 S.Ct 622, 624 (1939).

Due process of law does not require a hearing in every possible case of government impairment of a private interest. There is no inflexible procedure which is applicable to every conceivable situation. *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed. 551, 92 S.Ct. 1208, 1212 (1972). In deciding what process is constitutionally due in various contexts, this Court has emphasized that procedural due process rules are shaped by the risk of error inherent in the truth-finding process, *Carey* v. *Piphus*, 435 U.S. 247, 55 L.Ed. 252, 98 S.Ct. 1042, 1050 (1978) in order to avoid mistakes and minimize unfair deprivations of life, liberty, or, as here, property.

This Court has always felt that the risk of error in the legislative process is minimal and that therefore no process is constitutionally necessary to avoid mistaken deprivations of property as a result of the legislative process. *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 45 L.Ed. 879, 21 S.Ct. 625, 630 (1901). Further, the action of a body having authority to apportion a burden of assessment in arriving at the amount, while it may be inequitable and unequal, is "far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law." *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 41 L.Ed. 369, 17 S.Ct. 56, 70 (1896).

In *King* v. *Portland*, 184 U.S. 61, 46 L.Ed. 431, 22 S.Ct. 290 (1901) this Court approved an improvement

assessment procedure, where, as in this case, the hearing provided for affected property owners was conducted at a time when only the estimated cost of the improvement was known. The Court stated:

> The taxing district being formed upon a consideration of the utility of the work proposed, and the benefits to the property owners, and the cost of the work and its apportionment, *the amount of the assessment then followed as a certain deduction*, and the property owner having notice of all proceedings and the right to contest them, it would seem useless to give him a further right to contest the assessment. [Emphasis added.]

King v. *Portland*, 22 S.Ct. at 293. The *King* Court further stated that any number of options would suffice to satisfy the very minimal process to which a property owner might be entitled concerning the specific figure of the assessment. Among these options is the ability to make the property owner a party to a collection suit at which he can challenge the amount of the assessment before he loses his property. If this is possible, then the property owner cannot be heard to complain that his property is being taken without due process of law *Id: see also, Embree* v. *Kansas City & L.B. Road District*, 240 U.S. 242, 60 L.Ed. 624, 36 S.Ct. 317, 320 (1915).

In this case, the provisions of KRS 67A.871 through 67A.894 have made the assessment figure "a certain deduction" as in *King*. KRS 67A.888 and KRS

67A.889 enable a property owner to challenge a specific assessment amount before he loses his property. All necessary due process requirements have been met by KRS 67A.871 through 67A.894.

CONCLUSION

For the foregoing reasons, appellees move that this appeal be dismissed, or in the alternative, that the judgment of the Supreme Court of Kentucky be affirmed.

Lexington-Fayette Urban County Government
Department of Law
200 East Main Street
Lexington, KY 40507
(606) 254-8741

BY: Mary Ann Delaney
Mary Ann Delaney
Assistant Commissioner of Law

Attorney for Appellees Other Than Lexington-Fayette County Health Department

Greenebaum, Doll & McDonald
333 West Vine Street
Lexington, KY 40507
(606) 231-8500

BY: Phillip D. Scott
Phillip D. Scott

Attorney for Lexington-Fayette County Health Department

APPENDIX

SUPREME COURT OF KENTUCKY

82-SC-963-TG

RENDERED: Aug. 31, 1983
To Be Published

FINAL DATE *NOV 23, 1983*
/S/ Rose Tomlinson D.C.

RICHARD M. CONRAD, HELEN RICHARDSON, PAULA JEAN SYMPSON SMITH, RALPH J. RANSDELL, SR., HELEN M. PENA, CLIFFORD SCHLAUSKY, E.J. WAGNER and RICHARD C. COX — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
V. HON. ARMAND ANGELUCCI, JUDGE
CIVIL ACTION NO. 80-CI-1980

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J. H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE COUNTY GOVERNMENT; LEXINGTON-FAYETTE

COUNTY HEALTH DEPARTMENT,
GORDON R. GARNER, COMMISSIONER
OF PUBLIC WORKS OF THE LEXINGTON-
FAYETTE URBAN COUNTY
GOVERNMENT APPELLEES

OPINION OF THE COURT
BY JUSTICE WINTERSHEIMER

AFFIRMING

* * * * * * *

This appeal is from a judgment entered September 3, 1982, which determined that the Lexington-Fayette Urban County Government may proceed with a sanitary project because it complied with the provisions of the sanitary sewer act. Various property owners sought declaratory and injunctive relief challenging the proposed imposition of the special sewer assessment as unconstitutional.

The principal question presented is whether KRS 67A.871 is special legislation and therefore unconstitutional. Other issues raised are whether the government was required to strictly comply with the publication statutes, whether the council was required to set out adjudicative facts in support of the ordinance of initiation, whether the improvement benefit assessment formula was constitutional, and whether it was properly based on assessed value pursuant to statute, whether the government complied with the due process hearing requirements in connec-

tion with the public hearing, whether the government failed to comply with the actual notice requirements of the act in relation to the public hearing, whether the 30-day litigation period is unreasonable because it accrues before the actual cost of the project is known, whether the outside contracts entered into by the government with engineering and legal firms are void, whether the circuit court properly refused to allow this action to be maintained as a class action, and whether it was error to refuse to enjoin the project from proceeding.

This Court affirms the judgment of the circuit court because the statute is constitutional and the method of assessment valid.

The General Assembly was within its constitutional authority to provide authorization for urban county governments to construct and maintain waste water collection projects. Such authority is merely a logical extension of the legitimate power of any municipal government.

The project in question is known as the "third-year sewer project" and encompasses eight neighborhoods in Lexington-Fayette County, involving 1,657 parcels of property. In the original complaint, the appellants alleged 41 counts. On appeal, they present twelve arguments. A four-day trial was conducted beginning January 18, 1982, before the circuit judge without a jury. The evidence consisted principally of each property owner testifying and most of

the city council members as well as various government engineers and employees, the Commissioner of Health and a real estate appraiser. The government presented proof in support of their decision to establish the sewer project, and the property owners testified that they did not want, nor believe that they really needed sewers. Judgment was entered on September 3, 1982, and the appeal of the property owners was transferred to this Court on March 30, 1983.

The Urban County Government statute, KRS 67A.871 through 67A.894, is not special legislation and does not violate Section 59 or Section 60 or Section 156 of the Kentucky Constitution. The classification of urban county government by the legislature has been found to be a reasonable classification. *Holsclaw* v. *Stephens*, Ky., 507 S.W.2d 462 (1974). The fact that there is presently only one urban county government does not mean that the law is unconstitutional. *City of Louisville* v. *Klusmeyer*, Ky., 324 S.W.2d 831 (1959). The Urban County Sewer Act is an appropriate classification and bears a reasonable relation to the purpose of the act. Such a government is authorized to plan, develop, initiate and finance waste water collection projects. KRS 67A.872. The testimony of a former mayor explains the purpose of the act and provides a basis for the finding by the circuit judge. Where a merged government is established, it is necessary to have an equitable means of extending sanitary sewers to older neighborhoods in

former county areas. The act created a reasonable method of extending sewers and fairly assessing the costs of construction.

The appellants' argument that the act does not cover second-class cities with sewage problems is unconvincing. Those cities do not present the same situation as an urban county government because the areas of their jurisdiction do not encompass unsewered county territory. The act cannot be considered special legislation because the classification is not as broad as it could have been drawn. *Commonwealth, ex rel Hancock* v. *Davis,* Ky., 521 S.W.2d 823 (1975).

United Dry Forces v. *Lewis,* Ky., 619 S.W.2d 489 (1981), is distinguishable because the court found that a statutory proceeding authorizing wet/dry elections did not refer to the stated purpose of the statute and therefore did not reasonably relate to its purpose. Here, the law did relate to the legislative purpose of the act. Even considering *United Dry Forces,* supra, the act is not special legislation.

Additionally, legislative action is generally presumed to be constitutional. *Holzclaw (sic)* v. *Stephens, supra. Folks* v. *Barren County,* Ky., 313 Ky. 515, 232 S.W.2d 1010 (1950). At trial, there was no evidence or substantial argument to overcome the presumption of constitutionality which must be accorded the act. Here there is a reasonable relation between the classification of urban county govern-

ment and the purpose of the act. The circuit court is affirmed.

The failure of the government with regard to KRS 424.120(1)(b), is not reversible error. There was compliance with the law requiring publication. The circuit court determined that publication in the *Lexington Leader*, which is owned and published by the same corporaton that owns and publishes the *Lexington Herald*, was sufficient. Actually the *Herald* has a larger circulation than the *Leader*. The Court determined that the project received widespread publicity. All communication to the government's clerk had indicated that the *Leader* had the largest circulation. Furthermore, individual notices were mailed to the property owners advising them of the public hearing. There was no showing of any prejudice as a result of the erroneous selection of a newspaper.

The government believed that the *Leader* was the newspaper with the largest bona fide circulation because the previous written and oral communications from the publishing company had so indicated. In addition, the employee of the *Lexington-Herald Leader* company in charge of advising customers as to circulation figures for the purpose of running legal notices assumed the *Leader* to be the proper newspaper in which to publish legal notices. Prior to this lawsuit, all legal notices of the Board of Education, Lex Tran, Board of Health, airport board and the planning commission were published in the *Leader*.

The *Leader* did have the highest circulation until after March 1977. It was not until September 1980, that the government was informed of the change in circulation leadership.

Substantial compliance in regard to publication requirements has been authorized in *Queenan* v. *City of Louisville*, Ky., 233 S.W.2d 1010 (1950). The purpose of the statute is to allow the public an ample opportunity to become sufficiently informed on the public question involved. Substantial compliance was also affirmed in *Lyon* v. *County of Warren*, Ky., 325 S.W.2d 302 (1959). There the court considered the widespread publicity relating to the bond issue and a large voter turnout. Here there was considerable publicity about the initiation of the sewer project by means of radio, television as well as newspaper coverage. Consequently, the purpose of the statutory requirements of notification by publication was achieved. The trial judge was correct in determining that substantial compliance had been achieved.

It should be noted that the appellants in raising the question of inadequate notification are the very persons who have initiated the lawsuit, indicating that they were not denied notification. The appellant's contention that failure to strictly comply with the requirements of publication is a jurisdictional defect which would render the ordinance invalid is not persuasive. The various authorities cited do not convince us that the true purpose of the statute was not

achieved by substantial compliance. KRS 67A.880 provides that the date of publication of the ordinance of determination begins the 30-day litigation period. The ordinance in question was adopted on May 29, 1980, and published on June 3, 1980. There is no indication that anyone was prejudiced by the substantial compliance with the publication requirements.

There was a proper finding by the council. A municipal legislative body which provides for the construction of public improvements is performing a legislative act. Here the council adopted a program for the construction of sewers that was generally applicable throughout four project areas. It acted in a law-making and policy-making role. It was not acting adjudicatively. The appellants cite no authority to support their proposition that a legislative decision to construct public improvements can be characterized as an adjudicative function.

The legislative action of any governing body is subject to very limited judicial review. The legislature is not governed by judicial standards in making findings of fact. *McKinstry* v. *Wells*, Ky. App., 548 S.W.2d 169 (1977). The legislature cannot be arbitrary or capricious. The construction of public improvements will not be disturbed unless there is an abuse of discretion or a showing of fraud or illegality. *City of Tompkinsville* v. *Miller*, 195 Ky. 143, 241 S.W. 809 (1922); *Thomas* v. *City of Berea*, Ky. App., 557 S.W.2d 214 (1977). Here the record amply

demonstrates that the council made sufficient findings based on substantial information that the public health, safety and welfare required building the sanitary sewers. There is a well established rule of noninterference by the judiciary with the exercise of discretionary powers of municipal corporations. McQuillin, *Municipal Corporations* §10.37 (3rd Ed. Rev. 1979). "Courts are reluctant to and only in extreme cases will declare ordinances passed pursuant to legislative authority invalid on the ground that they are unreasonable, arbitrary or oppressive." *City of Somerset* v. *Newton*, 259 Ky. 195, 198, 82 S.W.2d 306 (1935).

The improvement benefit assessment formula was proper as used by the council. The appellants argue that neither the statute nor the assessment formula is constitutional because neither accounts for actual value conferred on individual property. A careful examination of the record indicates that there was no showing that the determination by the council was improper. Pursuant to the statutes the council adopted an improvement benefit assessment formula based on findings of fact that the benefited properties received substantially similar benefits.

Again the appropriate standard of review for legislative action is limited to whether the act in question is unreasonable or arbitrary. *Moore* v. *Ward*, Ky., 377 S.W.2d 881 (1964). Here there is a rational connection between the action and the purpose for which the

government's power existed. The government's decision as to the benefits conferred upon the properties in the third-year project and the improvement benefit assessments to be levied is supported by the various investigations, studies and other related information. There is no evidence in the record which indicates the properties would not be enhanced as a result of the new sewers.

It is well settled that a special assessment for public sewer improvements is not a "tax" but is an assessment which is to be made in an amount with reference to the benefit which the property derives from the cost of the project. *Krumpelman* v. *Louisville & Jefferson County Sewer District*, Ky., 314 S.W.2d 557 (1958). KRS 67A.873 provides that waste water collection projects may be assessed according to the assessed value basis. There is no basis for contending that the legislative action by city government is arbitrary because there is a rational connection between that action and the purpose for which the government was created. *McDonald* v. *City of Louisville*, Ky., 470 S.W.2d 173 (1971).

A municipal legislative judgment in relation to a public improvement project will be overturned only where it is shown that the action is so arbitrary and unwarranted as to result in confiscation. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 82 L.Ed. 1235, 58 S.Ct. 778 (1938).

The burden is on the person who challenges the action of the legislative body as being unreasonable and arbitrary to sustain that position where it does not appear on the face of the ordinance. *Louisville & Jefferson County Metropolitan Sewer District* v. *Joseph E. Seagram & Sons*, 307 Ky. 413, 211 S.W.2d 122 (1948). The record here does not indicate that the appellants have sustained their burden of proof. Balancing the arguments of the appellants and the appellees, it appears that the government made a significant effort to support its decision. The trial court was correct in its decision.

There was substantial evidence that the government's determination as to the appropriate assessment formula was proper under KRS 67A.875(5). The appellants provided no evidence that the formula was improper either under the statute or as applied to their properties. The trial court's finding was correct.

When the council determines that all benefited properties will be affected in substantially the same way, the council may classify the properties into assessment zones based on similarity of benefits. This section of the law was the foundation of the assessment procedure used by the council. There was testimony by various council members and the health commissioner that considerable study had gone into the adoption of the formula. The trial court found that the assessment procedure provided for twelve different zones and twelve different assessments. He

also determined that there was sufficient data to determine that the benefited properties received substantially equal benefits and that no evidence of inequality was presented at trial as well as no evidence of fraud or illegality in the council's action.

Again judicial review of legislative action in arriving at improvement assessment formulas is very limited. The courts will interfere only where there is an abuse of discretion. *City of Tompkinsville* v. *Miller, supra.* We find no reason to disturb the findings of fact as made by trial court.

The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a "trial-type" hearing.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. *Mathews* v. *Eldridge,* 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). On March 31, 1980, a public hearing was held on this project at which several property owners spoke on the subject and on the matter of the estimated assessments. No exact figures as to the cost of the benefits were presented because final bidding had not been made. All benefited property owners were given an opportunity

to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost to be assessed does not invalidate the meeting. If a property owner is given an opportunity to be heard at some time during the assessment proceedings before the liability of his property is fixed, due process is satisfied. *Shaw v. City of Mayfield*, 204 Ky. 618, 265 S.W. 13 (1924).

The failure of the protestants to persuade a majority of the council is not a violation of due process in and of itself. The ultimate council vote was 11-4 in favor of the third-year sewer project. Clearly they had the opportunity to present their views in a constitutional framework.

The contention that the improvement is a tax and therefore a trial-type hearing is necessary is without merit. The improvement benefit assessment is a special assessment as distinguished from a tax. *Krumpelman, supra.* The improvement benefits assessment is based on the relationship to benefits conferred. Here the legislative body acted to investigate legislative facts and no trial-type hearing was required. The municipal legislative body did not act in an adjudicatory manner. A general program applicable to properties throughout the project area was established. The property of the appellants was not treated individually based on facts peculiar to each situation. There is no indication that the action of the council was arbitrary or that there was an absence of a

rational connection between the action and the purpose of the act. The landowners did have an opportunity at a public hearing to be heard. The council's actions were lawful.

Council complied with the notice requirements of the act in connection with the public hearing. The trial judge correctly found that the mailing of individual notices to the property owners based on the records of the property valuation administration office was the most practicable method under the circumstances to give reasonable actual notice. There is no showing that the appellants were prejudiced by the method of notice used. Accordingly, the publication requirements were satisfied.

The 30-day statute of limitations is constitutional and within the power of the General Assembly to enact. The statute provides that the landowner must file a civil action within 30 days of the publication of the ordinance of determination. Here the appellants' timely filed this lawsuit. The trial court was correct in holding that the 30-day litigation period is not an unreasonably short period of time and within the authority of the legislature to enact.

The so-called outside contracts entered into by the government with engineering and law firms were legal and validly executed. The appellants argue the statute mandates engineering contracts be entered into only after the ordinance is passed. There is no mandatory requirement in KRS 67A.875 that the

engineering contracts be authorized after the ordinance is passed. Any language requiring the engineering work to be done after the passage of the ordinance is directory and not mandatory. A statute is considered as directory if it relates to some immaterial matter of it is does not reach the substance of the thing, and if by the omission to observe it, the rights of those interested will not be prejudiced. *Fannin* v. *Davis*, Ky., 385 S.W.2d 321 (1964). The substance of the law is that in conjunction with initiating a waste-water collection project, the government is authorized to contract for preliminary plans, specification and financial planning. An informed council decision to undertake this kind of project requires substantial preliminary information with regard to the area to be served and the related costs. The statute contains no mandatory language that consultants shall be retained only after the ordinance determining the need is passed. The evidence does not indicate any prejudice resulting from the timing of the execution of the engineering contracts. Neither the contracts, nor the appropriation of funds therefor, was unlawful. In addition, the statute specifically permits the use of firms of engineers without regard to whether the government has its own staff engineers. Such costs are specifically included in the project and passed on to the property owners. KRS 67A.871(5) and 67A.882(2).

In regard to the outside attorney fees, the urban county government has authority to retain outside

counsel for independent projects. A similar charter provision was endorsed in *Purcell* v. *City of Lexington*, 186 Ky. 381, 217 S.W. 599 (1920). In the absence of a specific statutory prohibition, a municipal corporation is generally permitted to contract with outside counsel. 56 Am. Jur. 2d *Municipal Corporations Etc.* § 219. *Heninger* v. *City of Akron*, Ohio App., 112 N.E.2d 77 (1951); *Moore* v. *City of Kokomo*, Ind., 60 N.E.2d 530 (1945). The Lexington-Fayette Urban County Government charter provides that private counsel may be retained. Section 3.02 permits the government to enter contracts with private persons with regard to the furnishing of services.

The circuit court correctly refused to allow this matter to be maintained as a class action. On October 14, 1980, an order was entered indicating that the government had requested a hearing on the class action aspects. Such a hearing was scheduled for November 14, 1980. The record does not indicate that evidence was introduced by the appellants to support their request. The trial court did not proceed as a class action but allowed the appellants to reapply for certification. This was not done.

The contention that the council did not study and evaluate the preliminary engineering and financing report is without merit. The evidence shows that the government did discuss and review the various reports at great length. There was no error of reversible consequence in the trial court's refusing to enjoin the project from proceeding.

It is the holding of this Court that the imposition of the special assessment for the sanitary sewer project is valid and constitutional.

The judgment of the circuit court is affirmed.

Aker, Gant, Leibson, Stephenson and Wintersheimer, JJ., concur. Vance, J., dissents. Stephens, C.J., not sitting.

ATTORNEY FOR APPELLANTS:

William C. Jacobs
Wilson, Jacobs & Wilson
173 North Limestone Street
Lexington, Kentucky 40507

ATTORNEY FOR APPELLEES:

Barbara B. Edelman
Rena G. Wiseman
Lexington-Fayette Urban Co. Govt.
Department of Law
200 East Main Street
Lexington, Kentucky 40507

Phillip D. Scott
Kathleen A. McDonough
Greenebaum Doll & McDonald
1400 Vine Center Tower
P.O. Box 1808
Lexington, Kentucky 40593
Counsel for Health Department

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SANITARY SEWERS

67A.871. Definitions for KRS 67A.872 to 67A.894.—As used in KRS 67A.872 to 67A.894, the following words or terms shall have the respective meanings indicated, unless a different meaning is clearly indicated by the context:

(1) "Assessed value basis" means the plan for the levying of improvement benefit assessments upon benefited property for benefits conferred by construction of projects on the basis of the assessed values (land only) of the benefited property, whether such levies are paid in full by benefited property owners or levied annually to amortize bonds. Such plan shall also include the levying of identical improvement benefit assessments upon classified zones of benefited property where determination is made by ordinance of an urban-county government, as provided in KRS 67A.872 to 67A.894, that benefits conferred by construction of a project are substantially equal and that the assessed value (land only) of all benefited property or designated zones thereof shall therefore be deemed equal in respect of a given wastewater collection project.

(2) "Benefited property, and property to be benefited" mean the property (land only) proposed to be benefited by construction of a wastewater collection project instituted by an urban-county government for the payment of the costs of which improve-

ment benefit assessments are to be levied against and collected from such benefited property.

(3) "Bonds" mean improvement lien bonds authorized and issued by urban-county governments pursuant to authority of KRS 67A.872 to 67A.894 for the purpose of providing costs for the construction of wastewater collection projects.

(4) "Construction" means and includes, the following services and facilities provided by an urban-county government:

(a) Preliminary planning to determine the economic and engineering feasibility of construction of wastewater collection projects, any engineering, architectural, legal, fiscal and economic investigations and studies necessary thereto, and all necessary surveys, designs, plans, working drawings, specifications, procedures and other required actions incident to the construction of wastewater collection projects;

(b) The building, acquisition, installation, erection, alteration, remodeling, improvements, expansion or extension of wastewater collection projects, and any other physical devices or appurtenances in connection with, or reasonably attendant to, such projects;

(c) The provision or making available sewer collection services to benefited property by providing sewer facilities to such benefited property although not directly financed by the issuance of bonds: and

(d) Inspection and supervision incident to the acquisition, construction and installation of wastewater collection projects.

(5) "Costs" as such term shall be applied to any wastewater collection project undertaken under KRS 67A.872 to 67A.894 includes the cost of labor, materials and equipment necessary to acquire, install and complete the project in a satisfactory manner, cost of land acquired, and every expense connected with the project, including construction costs, preliminary and other surveys, financial planning, inspections of the work as construction progresses, engineers' fees and costs, preparation of plans and specifications, publication of ordinances and notices, interest which will accrue on the bonds until the due date of the first annual improvement assessment levied in connection therewith, capitalized interest on the bonds for a period not to exceed three (3) years, a sum equal to any discount in the sale of the bonds (if discount bids are authorized and permitted by the issuing government), all or any portion of the debt service reserve requirement, if determination is made to finance them from bond proceeds, a reasonable allowance for unforseen contingencies, the printing of bonds and other costs of financing, including payment of attorneys' fees, underwriting and fiscal agency fees, trustees' fees, rating service fees and costs of issuance of bonds.

(6) "Debt service reserve requirement" means, with respect to any particular issue of bonds, the maximum annual requirements for payment of principal of and interest on the bond issue, which debt service reserve requirement shall be either funded in whole or in part by application of bond proceeds, or accrued in due course by the levying of improvement benefit assessments as provided in KRS 67A.872 to 67A.894.

(7) "Government or urban-county government" means an urban-county government which has been duly created and established pursuant to the provisions of this chapter.

(8) "Ordinance" means a formal and binding enactment of the urban-county council of an urban-county government entered in connection with the financing by such government of a wastewater collection project.

(9) "Public ways" shall include streets, boulevards, avenues, roads, lanes, alleys, parkways, courts, terraces and other courses of travel open to the general public by whatsoever name designated.

(10) "Wastewater" means any water or liquid substance containing sewage, industrial waste or other pollutants or contaminants derived from the prior use of such water or liquid substance.

(11) "Wastewater collection project or projects" means all or any part of any facilities, devices, objects and systems used and useful in the collection, holding

or transmission of wastewater from a benefited property to wastewater treatment plants or other similar facilities for final disposition thereof. Such terms shall include, without limiting the generality of the foregoing, sanitary sewage collection lines, intercepting sewers, outfall sewers, sewer laterals, power stations and pumping stations, and other equipment and their appurtenances necessary to enable the project to fulfill its function, including land acquisition, whether such project facilities are provided by funds derived from issuance of bonds or otherwise provided by a government in any manner.

67A.872. Authorization to construct and maintain wastewater collection projects.—The general assembly of the commonwealth of Kentucky finds and determines as a fact that in urbanized areas of the commonwealth, where industrialization and commercialization have progressed at a high rate, attended by rapid residential development, there is a particular public need for acquisition of major wastewater collection projects in the interests of the health, safety and welfare of the general public residing in such areas and in order to enable metropolitan population centers to plan and develop major community-wide sewer facilities; that it is therefore essential that urban-county governments be vested with alternative authority for the construction and installation of facilities for the collection of flowable liquid wastes generated by residential, commercial and industrial

uses for ultimate disposition in a proper manner at a cost of benefited properties; and that such urban-county governments be authorized and empowered to directly plan, develop, initiate, finance and carry out wastewater collection projects.

67A.873. Alternative or additional authority.—Urban-county governments created pursuant to this chapter are authorized to provide for, construct and finance wastewater collection projects according to the financing plan set forth in KRS 67A.871 to 67A.894. The authority hereby conferred upon urban-county governments is not intended, nor shall it be construed, to be in derogation or substitution of any authority otherwise conferred upon any urban-county government, but is alternative and in addition thereto. If any urban-county government has undertaken any proceedings under any other law to acquire a project, it may abandon such proceedings and proceed under the provisions of KRS 67A.871 to 67A.894. It is the purpose of KRS 67A.871 to 67A.894 to extend permissive authority to urban-county government to finance wastewater collection projects according to the assessed value basis, whereby benefited properties shall be assessed the cost of such projects according to benefits conferred upon the properties.

67A.874. Authority is exclusive.—In undertaking the planning, design, institution, authorization and financing of wastewater collection projects under

KRS 67A.871 to 67A.894, urban-county governments shall be vested within exclusive authority to plan, design, initiate, finance and carry out construction of such projects solely according to the requirements and procedures of KRS 67A.871 to 67A.894, without the necessity of securing approvals, ratifications or other consents from any other municipal corporation or the county encompassing any such government or in which any such government is situated.

67A.875. Determination of need by ordinance — Preliminary planning procedures — Ordinance of initiation. — (1) Any urban-county government which determines that the public health, safety and general welfare requires construction of a wastewater collection project and which proposes to undertake, authorize, construct and finance a wastewater collection project pursuant to KRS 67A.871 to 67A.894 shall, by appropriate ordinance of its urban-county council make such determinations and cause preliminary plans, designs, specifications and financial planning for such project to be prepared by one or more engineers, or one or more firms of engineers, licensed to do business in the Commonwealth of Kentucky. Alternatively, such preliminary procedures may be accomplished directly by duly qualified government personnel. A preliminary engineering and financing report shall be prepared in writing by such engineers for submission to the government.

(2) The preliminary engineering and financing report shall designate a geographical area in which a

wastewater collection project is recommended for construction, contain a reasonable description of the project facilities proposed to be constructed, contain a statement as to benefits to be conferred by the proposed project and the distribution of such benefits and contain an estimate of the costs of the proposed project. The urban-county council of such government shall reveive such preliminary engineering and financing report at a regular meeting, shall thereafter study and evaluate the same, and by duly enacted ordinance either approve the preliminary engineering and financing report as submitted, disapprove such report, or amend and approve same in its sound discretion.

(3) Upon approval of the preliminary engineering and financing report, or amendment thereof and approval thereof as amended, by the urban-county council of such urban-county government, such council shall formally initiate proceedings for the acquisition and financing of the proposed wastewater collection project by the enactment of an ordinance to be designated as the ordinance of initiation, in which public announcement shall be made of the wastewater collection project proposed to be acquired, constructed and financed, the identification of properties proposed to be benefited by such project, which benefited properties may be identified by naming the public way upon which the benefited properties abut, if any, or by geographical location, or by metes and bounds or other appropriate description. The

ordinance of initiation shall recite the nature and scope of the wastewater collection project being initiated by the government, shall give a preliminary estimate of the costs thereof, shall determine that each lot, parcel and tract of land named and identified in the ordinance of initiation as benefited property shall be afforded benefits by the project unless specifically excluded by such ordinance and shall order that a public hearing be held in respect of the proposed wastewater collection project.

(4) In all succeeding proceedings, the government shall be bound and limited by the ordinance of initiation with regard to the nature, scope and extent of the proposed wastewater collection project, but shall not be bound by or limited to the preliminary estimate of the costs of the proposed project. The costs of such project shall be determined upon the basis of construction bids publicly solicited by such urban-county government as required by KRS 67A.871 to 67A.894, and shall be binding upon the government and upon the owners of benefited properties, whether they turn out to be equal to, below, or above, such preliminary estimate of costs.

(5) In the ordinance of initiation, the urban-county council shall make findings of fact regarding the degree and nature of benefit which will accrue to benefited properties by the installation of the project. In the event the urban-county council determines as a fact that groups of benefited properties, or all

benefited properties, will be affected and benefited in substantially the same manner and to substantially the same degree, such urban-county council may determine that it is appropriate to classify benefited properties into one or more assessment zones based upon the similarity of benefits to be derived by benefited properties from installation of the project, and in such case, the urban-county council may deem all benefited properties within a particular assessment zone to be equally benefited and therefore equally treated for purposes of levying improvement benefit assessments to provide funds to pay the costs of the project. It is the intent of KRS 67A.871 to 67A.894 to vest in the urban-county council of any urban-county government undertaking a project, authority to make findings of fact in order to classify properties according to benefits conferred from the construction of projects, and such urban-county council may, as aforesaid, by appropriate ordinance, determine that identified groups of benefited properties will be benefited similarly by a project and shall therefore be treated equally for purposes of levying improvement benefit assessments upon such benefited properties. The urban-county council may accept and rely upon any pertinent data in making such findings of fact, including, the size and diameter of sanitary sewer service connections to be made available. In the event the urban-county council of the government shall determine that all properties situated within a particularly described classification or zone shall not receive

substantially equal benefits from the project. the urban-county council shall determine in the ordinance of initiation that such properties shall be assessed for benefits conferred based upon the relative assessed land valuation of each benefited property as it relates to the aggregate assessed land valuation of all benefited properties within such particularly described classification or zone initially, when property owners shall be afforded the the opportunity to pay improvement benefit assessments on a lump sum basis, and subsequently, during each annual period when bonds issued to provide for payment of costs of the project not paid by lump sum payments shall be outstanding. Findings of fact made by any urban-county council in accordance with the provisions of this section shall be entitled to a presumption of regularity and accuracy when based upon receipt of, and consideration of, factual data and information described in this section.

(6) The ordinance of initiation shall provide that a public hearing shall be held in respect of the proposed project at a time and place which shall be specified in the ordinance of initiation, and shall give notice that at the public hearing any owner of benefited property may appear and be heard as to whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis, all as

proposed by the ordinance of initiation and as authorized by KRS 67A.871 to 67A.894.

(7) The ordinance of initiation shall be published pursuant to KRS Chapter 424, and shall designate an individual, who shall be a member of the urban-county council or any government officer, to preside at the public hearing. In the absence of a designation in the ordinance of initiation, the mayor of the government shall preside at the public hearing. Notwithstanding the foregoing, the public hearing shall not be deemed irregular or improper if it is in fact presided over and conducted at the designated time and place by any official of the urban-county government. (Enact. Acts 1976, ch. 371, § 5, effective March 30, 1976.)

67A.876. Notice of public hearing.—The urban-county government shall cause notice of the public hearing ordered to be held by the ordinance of initiation to be afforded to all owners of property proposed to be benefited by the project and to be assessed for the costs thereof. The notice shall be published pursuant to KRS Chapter 424, and in addition, such reasonable actual notice as is best suited to advise affected benefited property owners shall be given to owners of the benefited property using such methods as shall be determined by ordinance of the urban-county government to be the most practicable in the circumstances. The notice shall advise owners of benefited property that a public hearing shall be held in respect of the project and its financing, and that

assessments to pay the costs of the project are proposed to be levied against all benefited properties. (Enact. Acts 1976, ch. 371, § 6, effective March 30, 1976.)

67A.877. Benefited properties—Later-connecting properties.—(1) The properties to be benefited by construction of a wastewater collection project shall consist of all real properties which are thereby afforded a means of draining wastewater from such properties, whether such real properties consist of unimproved land or contain improvements. Benefited properties shall include all real properties which are directly contiguous and abutting to any proposed sewer, lateral, main, outfall line, transmission line, interceptor, sewer easement to contain a project facility, or other project facility into which sanitary discharge and drainage of wastewater may be accomplished, whether the project sewer facility be constructed by application of the proceeds of the bonds or from funds otherwise made available by the government. Provided, however, the urban-county council of the government undertaking a project may adopt reasonable rules and regulations in respect of benefited property, and may exclude real properties which the urban-county council deems appropriate for exclusion because of location, size or other special circumstances.

(2) The urban-county council of the government may determine, either in the ordinance of initiation or in subsequent proceedings, the necessity and

desirability in the interests of the public health, safety and general welfare, that properties other than the benefited properties be permitted to connect to a wastewater collection project in the future, and may make equitable provisions which may be adjustable from year to year as bonds are retired, whereby the owners of such later-connecting properties may, be paying charges for the privilege of connecting and by assuming assessment obligations, be placed as nearly as practicable on a basis of financial equity with the owners of property initially provided to be benefited and assessed.

(3) Benefited property owned by any city, county, or urban-county government (or owned by the United States of America or any of its agencies, if such property is subject ot assessment by act of congress), shall be assessed annually the same as private property, and the amount of the annual assessment shall be paid by the city, county, urban-county government or United States government, as the case may be.

(4) Benefited property owned by the Commonwealth of Kentucky, except property the title to which is vested in the commonwealth for the benefit of a district board of education pursuant to KRS 162.010, shall be assessed as follows: Before assessing the commonwealth, the urban-county council shall serve written notice on the secretary of the department of finance of the Commonwealth, setting forth

specific details, including the estimate aggregate total amount of any improvement benefit assessment proposed to be levied against any property of the Commonwealth relative to the project. Said written notice shall be served prior to the next regular session of the general assembly of Kentucky so that the amount of any specific improvement assessment may be included in the biennial budget report to be submitted to the general assembly. Payment of any assessment shall be made only from funds specifically appropriated for that assessment. If an amount sufficient to pay the total amount of an assessment has been appropriated, then the total amount shall be paid, as and when due. If an amount sufficient only to pay annual assessment has been appropriated, then only the amount of the annual assessment shall be paid. The amount of the assessment shall be certified by the commissioner of finance of the urban-county government to the executive department for finance and administration, which shall thereupon draw a warrant upon the state treasurer payable to the government and the state treasurer shall pay the same.

(5) In the case of property the title to which is vested in the commonwealth for the benefit of a district board of education, the amount of the annual assessment shall be paid by the city, county, urban-county government or other local governmental agency or authority which represents the taxing authority of such board of education.

(6) No benefited property shall be exempt from assessment, except as herein provided. (Enact. Acts 1976, ch. 371, § 7, effective March 30, 1976; 1978, ch. 155, § 41, effective June 17, 1978.)

67A.878. Public hearing.—A public hearing shall be held at the time and place designated in the ordinance of initiation. Any person qualifying under the provisions of KRS 67A.875(7) shall preside and conduct the hearing. The presiding officer shall cause reasonable notes or minutes of the proceedings to be made, and they shall be submitted in writing to a subsequent regularly scheduled meeting of the urban-county council of the government. Any owner of property proposed to be benefited by the proposed wastewater collection project may appear and be heard at the public hearing, either in person or by a duly authorized representative. Any such owner of benefited property may submit to the presiding officer or to the designated clerk a written instrument in which such owner of benefited property is identified by name, address and designation of benefited property, and containing a statement of any reason for advocating or objecting to any of the aspects of the proposed project, and such written instruments shall be attached to and included in the written report of the hearing. Whether or not any such written instruments are submitted, the presiding officer at the public hearing may require those in attendance to execute an attendance roster, to properly identify themselves as

owners of benefited property or representatives of the owners, and may impose reasonable rules upon the conduct of the public hearing. The estimated costs of the project shall be disclosed at the public hearing, or, if construction bids for construction of the project have been received, the results of the bidding shall be disclosed. A report of local health agencies may be made a part of the public hearing, and government may cause distribution of informative materials and summarizations of engineering and health reports to be carried out at the public hearing. The public hearing may be adjourned to convene again, and from time to time either at a time and place announced at the public hearing or upon public notice of the time and place to be given in any manner the government may determine. (Enact. Acts 1976, ch. 371, § 8, effective March 30, 1976.)

67A.879. Consideration of written report of public hearing—Ordinance of determination.—At a subsequent regular meeting of the urban-county council of the government, the written report of the public hearing shall be publicly received and considered by the urban-county council. At the meeting, or any subsequent, properly convened, regular, adjourned or special meeting of the urban-county council prior to enactment of the ordinance of determination, owners of benefited properties may again be heard in person or by representatives. At any subsequent regular meeting, the urban-county council, following receipt of facts and data determined by it to be sufficient in

the premises regarding the wastewater collection project, including the report of public hearing, data submitted by local health authorities, if any, engineering information and data, statements by owners of benefited properties, and any other data deemed relevant, may adopt an ordinance, designated as the ordinance of determination, with respect to the project which may provided for either: (1) the undertaking of the project with provision for the financing thereof as previously set forth in the ordinance of initiation; (2) the abandonment of the project; or (3) the alteration of the nature and scope of the project, in which event the procedure for ordinance of initiation and public hearing shall be repeated pursuant to the provisions of KRS 67A.871 to 67A.894. The ordinance of determination shall be published as provided by KRS Chapter 424.

67A.880. Action by property owner for relief from ordinance of determination.—(1) Any owner of property to be benefited by the wastewater collection project may, within thirty (30) days after passage and publication of the ordinance of determination:

(a) File an action in the circuit court of the county in which the urban-county government is situated seeking relief by declaratory judgment, injunction or otherwise; or

(b) File in the office of the clerk of the urban-county government a written statement of intent to file such an action endorsed by a licensed attorney-at-

law to the effect that in his opinion his client has a reasonable and legitimate probable cause for such proposed litigation, in which event the time for filing the action shall be extended for fifteen (15) days after the date the statement is filed.

(2) In the event of the occurrence of either (a) or (b) above, all proceedings of the government with respect to the proposed wastewater collection project shall be abated until final judicial determination of the controversies presented thereby. In the absence of action by any owner or property proposed to be benefited as herein provided, the provisions of the ordinance of determination shall be final and binding. After the lapse of time as herein provided, all actions by owners of properties to be benefited shall be forever barred.

67A.881. Action by council when ordinance of determination upheld.—If the ordinance of determination authorizes the undertaking of the project and the financing thereof according to the plan of financing enacted by the ordinance of initiation, and if owners of benefited properties do not institute action as permitted by KRS 67A.880, or if such action be taken and shall result in final judgment permitting the government to proceed according to the ordinance of initiation and the ordinance of determination, the urban-county council of the government may proceed to implement and finance the costs of construction of the project as authorized by KRS 67A.871 to 67A.894.

67A.882. Bids—Apportionment of cost—Alternative payment methods and funding.—(1) Proposals for the construction of the project shall be solicited upon the basis of submission of sealed, competitive bids after advertisement by publication pursuant to KRS Chapter 424, following adoption of the ordinance of determination and expiration of the permissive litigation period, or alternatively, the conclusion of litigation in a manner favorable to the project.

(2) After all costs of the project have been determined upon the basis of the construction bidding, the costs shall be apportioned among the owners of benefited property pursuant to the method of assessment previously determined in the ordinance of initiation and the ordinance of determination. However, in determining the apportionment of individual costs for purposes of affording to the owners of benefited property the privilege of paying the assessment levies in full on a lump sum basis, the urban-county government shall exclude amounts required for the creation of the debt service reserve fund, capitalized interest costs, and any bond discount which the government may allow in connection with the sale of bonds to provide funds for the costs of construction not paid initially by the owners of benefited properties on a lump sum basis.

(3) The owners of benefited property shall be notified in writing of the exact amount levied against their individual properties, which amount may, at the

option of each owner, be paid in full on a lump sum basis within thirty (30) days. Such owners shall be notified that in the event the costs of construction of the project exceed lump sum payments and bond proceeds an additional apportionment of costs will be made and that all owners who paid the initial improvement benefit assessment on a lump sum basis must likewise pay the additional assessment on the same basis. The statement submitted to such owners of benefited property shall additionally advise such owners that in the event such owners do not elect to pay the special improvement benefit assessment in full within the period of thirty (30) days from receipt, the urban-county government shall issue bonds pursuant to KRS 67A.871 to 67A.894 for the purpose of providing the cost of construction of the project, including the debt service reserve fund, if paid from bond proceeds, capitalized interest costs, any bond discount, together with all other costs, as the term is defined in KRS 67A.871(5). The owners of the benefited property shall further be advised that bonds and the interest thereon shall be amortized by annual improvement benefit assessment levies against all benefited properties which have not made lump sum payments in accordance with the method of apportionment provided by the ordinance of initiation and the ordinance of determination.

(4) At the conclusion of the thirty (30) day permissive lump sum payment period, the urban-county

council shall determine the aggregate principal amount of improvement benefit assessments paid in full by owners of benefited property; shall order the deposit of the moneys in a trust account which shall be used solely to pay the costs of construction of the project; shall aggregate all unpaid improvement benefit assessments for purposes of determining the principal amount of bonds to be issued by the government to provide the costs of the project; shall compute the debt service reserve fund in respect to the bonds, if the fund is to be capitalized from bond proceeds; shall determine the bond discount and capitalized interest which shall be applicable to the issue of bonds; and shall proceed to complete the financing of the costs of construction of the project through the adoption of the ordinance of bond authorization as provided in KRS 67A.883 and the sale of bonds authorized pursuant thereto. Provided, however, that the ordinance of bond authorization may, as provided in KRS 67A.884, provide that, in lieu of issuing bonds, the government may contract with the Kentucky pollution abatement authority for the financing of the project, in which latter event all procedures with respect to the annual assessment of benefited properties shall continue in full force and effect, but the urban-county government shall secure funding for the project through the Kentucky pollution abatement authority in lieu of issuing bonds and shall pledge to and pay to the authority the annual improvement benefit assessment levies and enforce them for the security of the financing.

67A.883. Ordinance of bond authorization—Trust indenture.—(1) Following compliance with the foregoing provisions of KRS 67A.871 to 67A.882, the urban-county council of the government may adopt an ordinance known as the ordinance of bond authorization. The ordinance of bond authorization shall make provision, for the following:

(a) Determining and confirming the nature and scope of the project, the real properties to be benefited thereby (which shall be all benefited properties identified in the ordinance of initiation and the ordinance of determination, excepting properties as to which lump sum payment of improvement benefit assessment levies has been made within the statutory period), the exact method of assessment of benefited properties and the costs of the projects;

(b) Authorizing the issuance of bonds of the government from time to time which shall be designated "improvement lien bonds" and which shall additionally identify the project by reference to its name or title;

(c) Determining the principal amount of the bond issue, subject to the provisions of KRS 67A.891;

(d) Establishing the denomination and maturity dates of the bonds, which may be term or serial maturities not to exceed thirty (30) years from date of issue, and providing for the issuance of the bonds in series, if so ordered, each such series to be equally

secured on a pari passus basis by improvement benefit assessments levied on all benefited properties and by liens in respect thereto;

(e) Levying an annual improvement benefit assessment effective upon the benefited properties pursuant to the assessed value basis according to either their respect assessed land values as determined for purposes of general ad valorem taxation, or upon a basis of equality by zones, pursuant to findings of fact by the urban-county council that benefited properties in particular zone classifications are to be treated equally for assessment purposes because of substantial equality of benefits conferred, such assessments to be made without regard to any constitutional or other limits otherwise applicable to taxation for general ad valorem purposes, the annual rate of such improvement assessment to be fixed when regular county ad valorem taxes are levied and to be sufficient in each year to provide for the payment of the bonds and interest coupons as they mature; and, in each year until accrual of the debt service reserve requirement to be sufficient to provide in addition or sum equal to twenty percent (20%) of maximum annual principal and interest requirements, the same to constitute a debt service reserve fund as a precaution against possible default by reason of failures in the collection of the annual levies as hereinafter provided; provided, however, that in the event the government shall have provided that the debt service reserve requirement be financed from bond proceeds as one of

the costs of the project, such additional levies to accrue, the debt service reserve requirement shall be omitted, but it shall be promptly instituted at any time in order to maintain the debt service reserve requirement as its prescribed level;

(f) Covenanting with the holders of the bonds and coupons that until the payment in full thereof the government will levy annually an improvement benefit assessment upon each benefited property, as provided in the foregoing subsection (e) hereof; provided, that the government may provide by ordinance that certain benefited properties shall be omitted from assessment during initial periods not to exceed three (3) years because of construction scheduling;

(g) Covenanting with the holders of the bonds and coupons that until payment in full thereof, the government will pursue and exhaust at the expense of the government all remedies available to the government for the benefit and protection of the bondholders, including both termination of water service to delinquent real properties and enforcement of judgment and decretal sale of the liens upon benefited properties which are granted by KRS 67A.871 to 67A.894;

(h) Designating one or more places of payment of principal and interest within or without the Commonwealth;

(i) Specifying or omitting provisions for redemption and payment prior to stated maturities and the terms thereof;

(j) Providing for the payment by government of any and all reasonable and customary charges for the services of trustees and paying agents to the end that the holders of the bonds and coupons will receive the sums therein stipulated without deduction for such charges; and

(k) Any other provisions not contrary to law. The government is expressly authorized and empowered to finance any particular project by an issue of bonds which may be sold and delivered in one or more series, each of which series is equally and indistinguishably secured, as provided in KRS 67A.871 to KRS 67A.894, by improvement benefit assessments levied upon all benefited properties, and liens granted for the security of bondholders by KRS 67A.871 to 67A.894 on benefited properties shall apply to each benefited property and in favor of every bond of each such series, whenever issued.

(2) In the discretion of the urban-county council of the government, any improvement lien bonds or bond anticipation notes issued under the provisions of KRS 67A.871 to 67A.894 may be secured by a trust indenture by and between the government and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the Commonwealth of Kentucky. The trust

indenture of the government providing for the issuance of improved lien bonds or notes may pledge or assign for the security of improvement lien bonds or notes all or any part of the totality of improvement benefit assessments levied, collected, enforced and received by the government. The trust indenture shall contain provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable, proper and not in violation of law, including covenants and provisions setting forth the duties of the government in relation to the purposes to which improvement lien bond proceeds may be applied; the disposition and pledging of receipts of improvement benefit assessments; and the custody, safeguarding and application of all improvement benefit assessment revenues. It shall be lawful for any bank or trust company incorporated under the laws of the Commonwealth which may act as depository of the proceeds of bonds, notes or of government revenues, to furnish indemnity bonds or to pledge securities as may be required by the trust indenture of the government. Any trust indenture may set forth the rights and remedies of the bondholders and of the indenture trustee and may restrict the individual right of action by bondholders. In addition to the foregoing, any trust indenture may contain any other provisions as the government may determine to be reasonable and proper for the further security of the holders of the bonds. All expenses incurred in carrying out the provisions of the trust indenture shall be

treated as a part of the costs of the project and shall be paid from either the proceeds of the bonds or, during the life of the bond issue, from the proceeds of improvement benefit assessments levied against and collected from, benefited properties.

(3) All bonds issued under the provisions of KRS 67A.871 to 67A.894 shall have and are hereby declared to possess all of the qualities and incidences of negotiable instruments under the laws of Kentucky. The bonds may be issued in coupon or in registered form or in both, as the government may determine, and provision may be made for the registration of any coupon bonds as to principal only and also as to both principal and interest and for the reconversion into coupon bonds of any bonds registered as to both principal and interest. The government may sell the bonds in any manner either at public or private sale, and for any price as it may determine will best effect the purposes of KRS 67A.871 to 67A.894.

(4) Any government initiating a project pursuant to KRS 67A.871 to 67A.894 shall have and possess all powers and the authority set forth in KRS 58.150.

67A.884. Assistance agreement with Kentucky pollution abatement authority.—(1) Following enactment of the ordinance of initiation and the ordinance of determination, any urban-county government may enter into an assistance agreement with the Kentucky pollution abatement authority pursuant to the

authority of KRS Chapter 224A for the purpose of financing the costs of construction of a project pursuant to KRS 67A.871 to 67A.894. The Kentucky pollution abatement authority is hereby authorized to enter into an assistance agreement with any urban-county government for the purpose of providing, by the issuance of securities of the Kentucky pollution abatement authority, the costs of construction of any project instituted by any such government. Any such assistance agreement shall conform to the provisions of KRS Chapter 224A, except that repayment of a state grant made by the Kentucky pollution abatement authority to any urban-county government for any project shall be made from the proceeds of annual improvement benefit assessments levied against benefited properties by the urban-county government and remitted to the Kentucky pollution abatement authority as received, pursuant to KRS Chapter 224A. Provisions otherwise contained in KRS 67A.871 to 67A.894 for accrual of the debt service reserve requirement may be omitted if a comparable reserve is required funded by the Kentucky pollution abatement authority which must be repaid by any government contracting with the authority from assessment levies made against benefited properties.

(2) Any urban-county government may elect, following the completion of the preliminary procedures set forth in KRS 67A.871 to 67A.894, in lieu of issuing bonds, to finance the costs of construction

of a project not paid by payment of assessment levies on a lump sum basis pursuant to an assistance agreement with the Kentucky pollution abatement authority and pursuant to authority of KRS Chapter 224A, in which event the ordinance of bond authorization provided for in KRS 67A.833 shall provide for the obtaining of financing from the Kentucky pollution abatement authority in lieu of issuance of bonds, and all provisions of the ordinance of bond authorization relating to assessment of benefited properties for amortization of the costs of construction of the project shall relate to assessment of benefited properties for compliance with repayment provisions of the assistance agreement between the government and the Kentucky pollution abatement authority. In the event of such financing, proceeds secured from the Kentucky pollution abatement authority for construction of the project shall be treated, as provided in KRS Chapter 224A, and upon effectuation of the financing, all lump sum improvement benefit assessment payments shall be paid over to the Kentucky pollution abatement authority or its designee for application to the payment of costs of construction of the project. All security and enforcement provisions of KRS 67A.871 to 67A.894 shall apply in full to financing pursuant to either issuance of bonds or through the Kentucky pollution abatement authority.

67A.885. Deposit of funds—Security—Interest.—When any bonds are delivered and the proceeds are

received by the government, they shall be deposited in the a bank or trust company or combined bank and trust company, and to the extent the deposit may exceed insurance provided by federal deposit insurance corporation, the same shall be secured by a valid pledge of direct bonds or notes of the United States government or bonds or notes fully guaranteed thereby having at all times a market value equal to the undisbursed balance of such deposit; or shall be secured in any other manner as the urban-county council may approve. Costs of the project shall be paid from the proceeds of the bonds pursuant to such regulations and requirements as shall be determined by the government and incorporated into the ordinance of bond authorization. There shall be set aside into the sinking fund hereinafter created a sum from bond proceeds equal to all interest which will accrue on the bonds until the date when the first improvement benefit assessment levied in connection therewith will become due and payable, together with such further sum as may be provided in the ordinance of bond authorization, not to exceed interest on the bonds for a period of three (3) years. If provided in the ordinance of bond authorization, all or any portion of the debt service reserve requirement shall be set aside into the debt service reserve fund. If after completion, acceptance and payment of the work of all contractors and the payment of all costs of the project there shall remain an unexpended balance of bond proceeds, the balance shall be transferred to the sinking fund

created and maintained in connection with the project as provided by KRS 67A.871 to 67A.894.

67A.886. Bonds not indebtedness of government.—Each of the bonds shall bear on its face the statement that it has been issued under the provisions of KRS 67A.871 to 67A.894 and that it does not constitute an indebtedness of the government within the meaning of the Constitution of Kentucky. The bonds and the receipt of interest thereon shall not be subject to taxation. The bonds and the interest thereon shall be payable solely and only from the proceeds of the annual improvement benefit assessments levied by the government from time to time upon the properties benefited by the project identified in the bonds and from the debt service reserve fund; the government shall become directly and personally liable to the bondholders for any deficiencies which may arise as a direct result of failure by the government to pursue to exhaustion and in timely fashion all remedies lawfully available in the collection of such improvement assessments.

67A.887. Annual levy of assessment against benefited property.—The sum necessary to be raised annually for the sinking fund and consequent amortization of the outstanding bonds, whether all authorized bonds have been issued or not (together with the sum of any amounts required annually to pay trustees' fees, paying agents' fees, cost of administration of the project, and the cost of billing, collecting

and enforcing improvement benefit assessments, including fees of proper governmental bodies incident to placing assessment bills on tax statements, and collecting, enforcing and remitting same), shall be levied and assessed from time to time against the benefited properties pursuant to the prior determinations made by the government in respect of benefits received. If the urban-county council of the government has determined that all benefited properties within classified zones are substantially equally benefited and that all therein shall be assessed equally, the same assessment levy shall be made against each benefited property within a classified zone. In other cases, if any, the sum necessary to be raised annually for amortization of the bonds shall be levied and assessed against the benefited properties in the proportion that the assessed value of each individual lot, parcel or tract for urban-county government ad valorem taxation shall bear to the whole assessed value of all the benefited properties as shown by the records upon which urban-county government ad valorem taxation may from time to time be based. Where there is no such record, as in the case of public property or property owned by religious, charitable or educational institutions, the same (except that owned by the United States government) shall be specially assessed by the proper assessing officers and for such special assessment reasonable compensation shall be paid. Any such special assessment shall be subject to all procedures for equalization and judicial review as may

be provided by law in connection with ordinary assessments.

67A.888. Time of levy—Date taxes due—Collection of improvement benefit assessments.—The annual improvement benefit assessment for the project shall be levied by the government against benefited properties when the levy for general urban-county government taxes is made; and such improvement benefit assessment levy shall be due at the same time when general urban-county government taxes are due and shall be subject to the same penalties and accrual of interest in the event of nonpayment as in the case of the general urban-county government taxes. Improvement benefit assessments shall be collected by the urban-county government officers charged with responsibility for the collection of ad valorem taxes and shall be enforced in like manner.

67A.889. Lien for annual improvement assessment.—Each annual improvement assessment, with any penalty or interest incident to the nonpayment thereof, shall constitute a lien upon the lot or parcel of benefited property against which it is assessed. The lien shall attach to each lot or parcel of benefited property as the same is described by the owner's deed of record in the county clerk's office at the time of the publication of the ordinance of initiation, as provided, and thereupon shall take precedence over all other liens, whether created prior to or subsequent to the publication of the ordinance, except state and county

taxes, general municipal taxes, and prior improvement assessments and shall not be defeated or postponed by any private or judicial sales, by any mortgage, or by any error or mistake in the description of the property or in the names of the owners. No error in the proceedings of the urban-county council shall exempt any benefited property from the lien for the improvement assessment, or from the payment thereof, or from the penalties or interest thereon, as herein provided. No error in the proceedings of the urban-county council shall exempt any property from liability for payment of any annual improvement assessment, or for any interest or penalty incident to nonpayment thereof. The urban-county council of the government shall have power to make such rules and orders as may be required to properly administer the project.

67A.890. Proceeds to be kept in separate account—Sinking fund.—The proceeds received by the government from each annual improvement assessment levy made in connection with the project, as authorized by KRS 67A.871 to 67A.894, shall be segregated from and kept always separate and apart from all other receipts of the government from all other sources, and shall be deposited in a separate and special account in a financial institution in an account so specially designated by number or other designation as to identify it in such manner as to distinguish the receipts and deposits from the project from the receipts and deposits from every other project, and

from any other account or fund of the government. It shall constitute the "sinking fund" referred to in KRS 67A.871 to 67A.894.

67A.891. Uses of sinking fund.—All sums received and deposited in the sinking fund shall be held inviolate and applied by the government, or the trustee in respect to the bonds solely for the financing of the identified project. The amount levied, collected and deposited in the sinking fund from initial improvement assessment levies in connection with the project, in excess of maturing principal and interest of the bonds and equal to twenty percent (20%) of maximum annual principal and interest requirements, for the purpose of creating the debt service reserve fund shall be held in the sinking fund as a special reserve for that purpose. Such excess levies shall continue annually until the debt service reserve requirement has been accrued in the debt service reserve fund in respect of all outstanding bonds; provided that the debt service reserve requirement may be funded from the proceeds of the bonds. If, at the time of any annual levy of the improvement assessment, the sum held in the sinking fund as debt service reserve fund shall exceed the debt service reserve requirement, such excess may be taken into account in fixing the rate of the improvement benefit assessment for the ensuing year; and if the amount so held in the debt service reserve fund is below the specified level, the next annual improvement assessment levy shall be increased

in a corresponding manner so as to accrue the debt service reserve requirement. In making the improvement assessment levy for the year preceding the final maturity of bonds for any project, the urban-county council may take into account, and make allowance for the amount held in the sinking fund of the project as the debt service reserve fund; and if in making the levy the urban-county council shall miscalculate and provide funds insufficient to pay the final maturing principal and interest, the governing body shall be authorized, and shall be required, to make a subsequent improvement assessment levy upon the benefited properties sufficient to make up the deficiency, with interest to date of payment. If the procedures required by KRS 67A.871 to 67A.894 shall result in a surplus after payment and discharge of the bonds, and all interest thereon to date of payment, such surplus shall be refunded, pro rata, to the owners of benefited properties, as determined at the date the surplus is ascertained by the governing body to exist.

67A.892. Insufficiency of bonds.—If, by reason of miscalculation or the happening of unforeseen events or conditions, the proceeds of the bonds authorized by the ordinance of bond authorization should prove to be insufficient to provide for the completion of the project and the payment in full of all costs thereof, the urban-county government shall be responsible for any such deficiency.

67A.893. Sewer connection mandatory.—In the interests of the health, safety and welfare of the general public and for the protection of the public health, the government is authorized and empowered, by ordinance, to mandatorily require the owners of all benefited properties to cause any improvements capable of the generation of wastewater situated on such benefited properties to be connected to the facilities of the wastewater collection project. Urban-county governments are authorized and empowered to covenant with the holders of bonds to order mandatory connection of all improved premises situated upon benefited properties to the facilities of a project financed pursuant to KRS 67A.871 to 67A.894.

67A.894. Return of funds if project not completed.—If an urban-county government has taken any steps under KRS 67A.871 to 67A.893 to provide for, construct or finance any project, and for any reason the project cannot be completed according to the provisions of KRS 67A.871 to 67A.893, the government shall return all improvement benefit assessments paid in full by owners of benefited property on a lump sum basis to the owners thereof. Any interest earned on such prepayments shall be applied by the government to the payment of any costs resulting from effort to carry out the project, and any remainder shall be returned, pro rata, to such owners of benefited property. Thereafter, such urban-county government may proceed to finance and construct the project in any other manner authorized by law.

ENTRY OF APPEARANCE AND PROOF OF SERVICE

I, Mary Ann Delaney, a member of the Bar of the Supreme Court of the United States of America, enter an appearance as attorney of record for Appellees, Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; and Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government. I hereby certify that on the 8th day of March, 1984, I served three (3) copies of the foregoing Motion to Dismiss Appeal or in the Alternative to Affirm Judgment and Appendices, by causing true copies thereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed to counsel of record for Appellants herein, Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507.

That on the 29th day of December, 1983, the Attorney General of the Commonwealth of Kentucky, by counsel, served his NOTICE OF INTENT NOT TO INTERVENE, acknowledging receipt of the Notice of

Appeal under Rule 10 of the Rules of the Supreme Court of the United States filed by Appellants in the Supreme Court of Kentucky, informing the Court and the parties that the Attorney General did not intend to intervene.

The undersigned further certifies that a true copy hereof was served upon the Clerk of the Supreme Court of Kentucky, such clerk being the clerk of the court whose judgment is sought to be reviewed by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Clerk, Kentucky Supreme Court, Room 209, Capitol Building, Frankfort, Kentucky 40601. Further the undersigned certifies that a true copy hereof was served upon the Clerk of the Fayette Circuit Court, such clerk being the clerk of the court possessed of the record herein, by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Robert M. True, Clerk, Fayette Circuit Court, Room 200, Courthouse, Lexington, Kentucky 40507.

The undersigned states that all parties required to be served are the parties named above, accompanied by the addresses of their respective counsel, and that all such parties have been served, as herein certified.

MARY ANN DELANEY
Lexington-Fayette Urban
County Government
Department of Law
200 East Main Street
Lexington, Kentucky 40507

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